



Construction Program Procedure Bulletin

CPB 02-1 Dispute Review Board Process and Responsibilities

References: *Construction Manual*, Chapter 5, "Contract Administration," Section 4, "Disputes"
Standard Special Provision, S5-170, "Dispute Revision Board"
California Public Contract Code, Section 10240.2

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Approved:

A handwritten signature of Robert Pieplow in black ink, written over a horizontal line.

ROBERT PIEPLOW
Chief, Division of Construction

Approval Date: March 19, 2002

BACKGROUND

Since 1998, mandatory Dispute Review Boards (DRB's) have been specified on large contracts to aid in the early resolution of construction disputes. DRB's have been instrumental in timely resolution of many disputes and assisted in avoiding costlier and more litigious methods of dispute resolution.

Formal and informal training has been used to date for instructing Department personnel on contract administration and responsibilities related to DRB's. The Division of Construction is establishing the "best practice" to ensure that the DRB process is being effectively applied on a statewide basis.

PROCEDURE

Responsibilities:

District Construction

Resident engineer:

- Pursues the establishment of the DRB within 45 days of contract approval. A determination of non-responsiveness will require a retention to be taken in conformance with the new contract requirements.
- Ensures that a contract change order is issued and approved after DRB members have been selected and approved, but prior to the first DRB meeting.
- Reviews and processes contract change order payments to the contractor for reimbursement of one-half of authorized DRB costs.
- Removes DRB members who do not comply with financial or employment relationship requirements. Removal of a DRB member shall be discussed with the Division of Construction coordinator prior to sending notification.

- Processes DRB status forms (CEM-6202, "DRB Establishment Report," CEM-6203, "DRB Update Report," CEM-6204, "DRB Issue Report," and CEM-6205, "DRB Completion Report") to the Division of Construction contract specialist (potential claims).
- Maintains minutes for all progress meetings.
- Gives status presentations at all progress meetings.
- Attempts to resolve disputes with entitlement prior to a party's referral to the DRB.
- Provides the Department's position paper for each dispute issue.
- Presents the Department's position and rebuttal to the contractor's position during DRB issue meetings.
- Provides information requested by the DRB.
- Coordinates the Department's response to the DRB recommendation in conformance with these guidelines.

Construction engineer:

- Assists the resident engineer in the analysis of the dispute from initiation to resolution or if unresolved, to the claims process.
- Ensures the performance of DRB related activities.

Construction managers and deputy district director of construction:

- Monitor DRB dispute resolution process for effectiveness.
- Assure district construction compliance with DRB requirements.

Division of Construction

Contract specialist (potential claims):

- Maintains listing of prequalified Department DRB nominees.
- Modifies DRB standard special provision and DRB agreement requirements based on the evaluation of their effectiveness.
- Coordinates DRB training courses.
- Maintains DRB database utilizing the DRB status forms completed by the resident engineer.
- Acts as a consultant for the districts on DRB procedural matters.

Construction coordinators:

- Provides the Division of Construction review on project issues related to DRB's.
- Provides the Division of Construction rejection or approval on project issues related to DRB's.
- Provides the Division of Construction rejection or approval of third DRB member.

Chief, Division of Construction:

- Makes the final determination as to whether to reject an unfavorable DRB recommendation.

Guidelines:

Establishment and Operation

Establishing a DRB early in a contract is important to aid in future disputes that may arise. Delayed DRB formation may affect the ability of the DRB to accurately formulate a reference framework to evaluate future disputes. In instances where DRB's have been established untimely or after a dispute has already arisen, often both the contractor's and engineer's narration of relevant events prior to the dispute will differ markedly from one another. In such cases the DRB is left to derive the "truth" from the versions presented.

The DRB is to be established within 45 days of contract approval. A retention specification clause has been added to encourage the contractor to establish the DRB within this timeframe. The engineer and contractor jointly share in the responsibility of timely DRB establishment. Contract retentions taken where the engineer has been non-responsive in DRB establishment will create problems and are to be avoided.

The Department's nominated DRB member shall be selected from the prequalified list available on the Office of Contract Management's Intranet site:

["http://projdel.dot.ca.gov/construction/contractmanagement/drb/ct_names.htm"](http://projdel.dot.ca.gov/construction/contractmanagement/drb/ct_names.htm).

The nominee's knowledge of the specific type of construction to be performed should be considered as well as any potential conflicts of interests the nominee may have. The resident engineer will contact the nominee, verify that the nominee is willing and able to serve on the DRB and obtain the nominee's project specific disclosure statement. Once the nominee is selected the resident engineer will provide written notification to the contractor of the nomination, a copy of the nominee's written disclosure statement and request a contractor's response on the nomination within an appropriate timeframe. This process will be repeated if the nomination is 1) rejected without cause on a one-time basis or 2) rejected with cause based on the written disclosure statement. The resident engineer will inform the Division of Construction coordinator of any nominee rejection.

The contractor is required to provide written notification of his nominated DRB member and corresponding disclosure statement. The resident engineer will review the nominee's disclosure statement on the bases of qualifications and potential conflicts of interests. Assistance in the review of the disclosure statement may be obtained through the Division of Construction coordinator or district claims engineer. Written notification will be provided to the contractor regarding the approval or rejection of the contractor's nominee. This process will be repeated if the nomination is 1) rejected without cause on a one-time basis or 2) rejected with cause based on the written disclosure statement. Any rejection needs to be discussed with the Division of Construction coordinator prior to notifying the contractor.

Upon both parties approving each other party's nominee, the resident engineer will contact the first two DRB members and request they provide a nomination and written disclosure statement for the third DRB member nominee to both parties. When the resident engineer receives the name and disclosure statement for the nominee, this information must be forwarded to the Division of Construction coordinator for review. The third DRB member nomination requires the Division of Construction's approval by the construction coordinator. The resident engineer will provide the approval or rejection notification to the other two DRB members. When the third DRB member has been approved by both parties, the resident engineer will request the DRB chairman set a date for the first meeting. The DRB agreement needs to be signed by each DRB

member, the contractor and the resident engineer in advance of the initial DRB meeting. An executed and approved contract change order is required prior to holding the initial DRB meeting.

Equally important to the success of the DRB process is holding regular progress meetings with the DRB. These progress meetings keep the DRB members informed of project progress and potential issues that may ultimately be referred to the DRB. Progress meetings are to be held at a minimum of every four months per the revised specification. On fast-paced projects, progress meeting frequency may need to be increased to every two months. If a contract goes into a significant suspension period, the frequency of progress meetings may need to be re-examined. The format of a typical progress meeting is contained within the DRB agreement.

An essential part of a progress meeting is the site visit. DRB members are to tour the site with a representative of both the engineer and the contractor at all times. The visit should not only include active project construction activities but also upcoming project work areas.

DRB and Partnering

Both partnering and DRB's are alternate dispute resolution processes. Unresolved disputes are to adhere to each process concurrently; however, each process is independent of the other and interaction of the two processes is not to take place.

DRB Information System

In order to monitor the performance of the DRB process, accurate records must be forwarded to the Division of Construction. The resident engineer will use the DRB status forms and the referenced supplemental information to assist the Department in monitoring DRB establishment, updates, issues and completion. This information shall be forwarded to the contract specialist (potential claims) in the Division of Construction in conformance with the timeframes specified on each form.

Disputes

Once a dispute has been referred to the DRB, the resident engineer shall begin preparing a position paper for submittal to the DRB and contractor. The suggested format for the position paper is similar to the format of a construction claim report. The essential portions of the position paper are the following:

Description of dispute – Consisting of a summary paragraph which succinctly defines the nature of the contractor's request and describes the basis for the district's finding of no merit.

Background/Chronology of the dispute – Consists of the history of the issue in a narrative format including the facts, presented in a non-judgmental manner. Include descriptions of any partial or attempted resolutions.

Contractor's stated position – Present the contractor's stated position as presented to the Department in the notice of potential claim, other written materials or verbal communications. Quoted segments are most effective when supplemented by the exhibits themselves. This section should be presented in a non-judgmental fashion and not be expanded beyond the contractor's previously stated position(s).

Department's position – Consists of a logical flow of ideas and defines facts related to the contractor's position which resulted in the determination of no merit. A persuasive presentation of the relevant contractual requirements is to be included here. Supporting information may be referenced within this section and included in the exhibit section.

Summary – A concluding paragraph which recaps the dispute and succinctly states why contractually and factually there is no merit to the contractor's request. The summary is to be a strong absolute statement of the Department's position. Feelings or beliefs are not appropriate.

Exhibits – Limited in number to those focused on illustrating and clarifying contractual/technical requirements. Section to have a table of contents with individual exhibits tabbed and numbered for locating easily.

Once a position paper has been drafted, it is recommended that it be distributed to the construction engineer and the Division of Construction coordinator for comments. This must be done far enough in advance to incorporate appropriate comments prior to submittal of the position paper to the DRB and contractor. Position papers should be submitted to the DRB and contractor one or two days in advance of the deadline. Material not submitted to the DRB or other party within the required timeframes is not to be considered by the DRB.

Equally important in presenting the Department's position effectively to the DRB is the presentation during the issue meeting. An effective presentation begins in advance of the issue meeting itself. It is strongly recommended that a mock presentation be held at least a week in advance of the issue meeting.

Attendees at the mock presentation should include the resident engineer, construction engineer, structure representative, area bridge engineer and job staff, as appropriate. Other attendees may include technical experts, district claims engineer, contract reviewer, construction area manager, Division of Construction coordinator, contract specialist (potential claims), and others with dispute review board experience depending on the size and complexity of the issue under consideration. The purposes of the meeting are to examine the contractor's position, review the basis of the Department's determination of no merit, and rehearse the Department's portion of the presentation including potential rebuttal statements. During the mock presentation, it is advisable that an experienced participant, not directly involved in the contract, takes on the role of the "devil's advocate". The goal is to provide constructive criticism of both the Department's position and the Department's rebuttal of the contractor's position.

A DRB issue meeting will typically conform to the following:

- Informal meeting without testimony, cross-examination, transcripts and "bench" decisions.
- Claimant in the dispute will begin with his presentation to be followed by the other party's presentation.
- Rebuttal statements will follow.
- DRB members may ask questions or make requests for clarifications.

While the DRB recommendation is non-binding on both parties, it is important that the Department effectively present the dispute issue to the DRB because the DRB recommendation may be introduced in arbitration proceedings.

DRB Recommendation and Response

The DRB is required to issue their recommendation within 30 days of the issue meeting. Once received, the recommendation needs to be reviewed immediately.

Requests for clarification of the DRB recommendation will only be considered if made within 10 days of receipt of the recommendation. Any request for clarification of a DRB recommendation needs to be discussed with the Division of Construction coordinator prior to issuance. Examples where requests for clarification are warranted are when the DRB recommendation fails to thoroughly explain the rationale for the recommendation, the Department's position has been misstated, or contractual provisions have been disregarded without explanation.

Requests for reconsideration of an issue may be made to the DRB. Such requests will only be considered if new evidence concerning the dispute is provided and the request is made within 30 days of receipt of the DRB recommendation. Reconsideration requests are to be discussed with the Division of Construction coordinator prior to issuance.

The Department's response to the DRB recommendation is to be coordinated and completed by the resident engineer within 30 days of receipt of the DRB recommendation. Failure to respond within the 30-day time frame results in acceptance of the DRB recommendation by default. Rejection/acceptance of a DRB recommendation shall be in conformance with the following:

1. Acceptance of a DRB recommendation in the Department's favor does not require the Division of Construction approval; however, the resident engineer will need to notify the Division of Construction coordinator of the contractor's acceptance/rejection of the DRB recommendation when received.
2. Acceptance of a DRB recommendation in the contractor's favor will require the Division of Construction approval if the issue is precedent setting or if the resulting contract change order approval is not within district delegation. The resident engineer will also need to coordinate the response with the Federal Highway Administration (FHWA) representative on non-exempt federal projects to ensure their participation in any related contract change order. Typically the FHWA representative will also want to be notified when any issue has been referred to the DRB, the date of any DRB issue meetings, and of any DRB recommendations. Regardless of whether or not the response requires the Division of Construction approval, the resident engineer will notify the Division of Construction coordinator of the contractor's acceptance/rejection of the DRB recommendation when received.
3. Rejection of any DRB recommendation requires the approval of the chief, Division of Construction. When the resident engineer, construction engineer, construction manager and deputy district director of construction believe a DRB recommendation should be rejected, the resident engineer needs to forward a copy of the DRB recommendation as soon as possible to the Division of Construction coordinator. A discussion between the construction manager and the Division of Construction coordinator discussing the reasoning for the rejection request will follow. Approval for rejection of a DRB recommendation will be transmitted through the Division of Construction coordinator to the deputy district director of construction.

DRB Special Occurrences

Contracts with the DRB specification require the contractor to comply with the contractual processes for dispute resolution. If the resident engineer provides a "no merit" response to an issue, a statement is to be included advising the contractor of the right to refer the issue to the DRB within 21 days of receipt. The contractor's failure to adhere to the DRB requirements involving a dispute issue will result in a bar to pursuing the issue as a claim in arbitration pursuant to the specification and contract law (*California Public Contract Code*, Section 10240.2).

When issues occur late in the project that do not allow for a timely issue meeting or even a timely referral to the DRB, the contractor will be allowed to pursue the issue as a claim and in arbitration provided the notice of potential claim dispute process has been followed.

The Department will consistently administer contracts in this manner to maintain the effectiveness of the contractual dispute resolution processes.

Attachment